Supreme Court
FILED

941192 DEC 7 1994

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No. 94-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1994

LYNN A. JENKINS,

Petitioner

versus

ELAINE B. WEIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The primary issues before the Court on this Petition are based on judicial abuse or error in the following areas: See: William Daubert, et ux., et al., v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993); Milkovich v. Lorain Journal Co., 497 U.S. 1, 111 L.Ed.2d 1, 110 S.Ct. 2695 (1990); Brehany v. Nordstorm, Inc., 812 P.2d 49 (Utah 1991). Russell v. Thomson Newspapers, Inc. et al, 842 P.2d 896 (Utah 1992) and West v. Thomson Newspapers, Inc., et al, 835 P.2d 179 (Utah App. 1992) Cert. Granted 843 P.2d 1042 (Utah 1992); West v. Thomson Newspapers, Inc. 872 P.2d 999 (Utah 1994), all of these cases appear to conflict with the Utah Courts' opinion which allegedly denied Petitioner his constitutional rights and protection.

(1) Did Utah's Supreme Court and Court of Appeals err in upholding the trial court's determination that Petitioner was a public figure without appropriate findings or legal basis for such determination?

(2) Did Utah's Supreme Court and Court of Appeals err in upholding the trial court's dismissal of two of Petitioner's three

causes of action without motion by opposing party during trial on those matters and without affording Petitioner the opportunity to present evidence, memorandum or argument there on?

(3) Did Utah's Supreme Court and Court of Appeals err in upholding the trial court's jury instructions, such as to the truth, which required the jury to make determinations and rulings as to a matter of law?

(4) Did Utah's Supreme Court and Court of Appeals err in upholding the trial court's allowance of the Utah Attorney General to represent the Respondent and in allowing members of the Utah Attorney General's staff to testify at trial?

(5) Did Utah's Supreme Court and Court of Appeals err in upholding the trial court's allowance of untimely pre-trial motions in derogation of the rules of the Utah Code of Judicial Administration?

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OPINIONS BELOW

The Utah Court of Appeals' decision below has been published Jenkins v. Weis, 868 P.2d 1374 (Utah App. 1994). The Court of Appeals' majority and dissenting opinion is attached hereto as APPENDIX "A". Petition for Writ of certiorari was denied on September 8, 1994 by the Supreme Court of Utah, Jenkins v. Weis, No. 940130, 248 Utah Adv. Rep. 26, which is attached hereto as APPENDIX "B".

STATEMENT OF JURISDICTION

The Judgment of the Supreme Court of Utah was entered on September 8, 1994. The jurisdiction of this Court is invoked under 28 USC § 1257.

DETERMINATIVE CONSTITUTIONS, STATUTES AND RULES

Petitioner sets forth verbatim in pertinent parts, the following determinative Constitutions, statutes and rules.

CONSTITUTIONS

Federal

United States Constitution:

Amendment I. Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Amendment XIV Section 1

. . . .No state shall make or enforce any law which shall abridge the privileges . . . of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Utah

Utah State Constitution:

Article I Section 1.

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; . . . protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Article I Section 2.

. . . and all courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of the law.

Article I Section 15.

No law shall be passed to abridge or restrain the freedom of speech or of the

press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. (emphasis added)

Article VII, Section 15.

The Attorney General shall be the legal adviser of the State officers, except as otherwise provided by this Constitution, and shall perform such other duties as provided by law. (1981)

STATUTES

Utah Code Annotated:

§45-2-2.

(1) "Libel" means a malicious defamation, expressed either by printing or by signs or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt or ridicule.

(2) "Slander" means any libel communicated by spoken words.

§45-2-3.

A privileged publication or broadcast which shall not be considered as libelous or slanderous per se, is one made:

(1) In the proper discharge of an official duty.

(2) In any publication or broadcast of or any statement made in any legislative or judicial proceeding, or in any other official proceeding authorized by law.

(3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested

as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.
(4) By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof, or of a charge or complaint made by any person to a public official, upon which a warrant shall have been issued or an arrest made.
(5) By a fair and true report, without malice, of the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or the publication or broadcast of the matter complained of was for the public benefit.

§45-2-10

A privileged broadcast which shall not be considered as libelous, slanderous, or defamatory per se, is one made:

(1) In the proper discharge of an official duty.

(2) In any broadcast of or any statement made in any legislative or judicial proceeding, or in any other official proceeding authorized by law.

(3) By a fair and true report, without malice of a judicial, legislative or other public official proceeding, or of anything said in the course thereof, or of a charge or complaint made by any person to a public official, upon which a warrant shall have been issued or an arrest made.

(4) By a fair and true report, without malice, of the proceedings of a public meeting, if such meeting was lawfully convened, for a lawful purpose and open to the public or the broadcast of the matter complained of was for the public benefit.

§67-5-1.

The attorney general shall:

(1) attend the Supreme Court and the Court of Appeals of this state, and all courts of the United States, and prosecute or defend all causes to which the state, or any officer, board, or commission of the state in an official capacity is a party; and take charge, as attorney, of all civil legal matters in which the state is interested; . . .

RULES
Utah

Utah Rules of Evidence:
Rule 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Utah Code of Judicial Administration
Rule 4-501

(1) All motions, except uncontested or ex-parte matter, shall be accompanied by a brief statement of points and authorities and affidavits relied upon in support thereof . . . If a memorandum of points and authorities is filed in support of a motion, it must be served on the opposing party or counsel and filed with the court no later than ten (10) days before the date set for hearing.

Rule 4-503

(1) All jury instruction requests shall be presented to the court five days prior to the scheduled trial date unless otherwise ordered by the court. The court, in its discretion, may allow the presentation of jury instructions at any time prior to the submission of the case to the jury. At the time of presentation

to the court, a copy of the requested instructions shall be furnished to opposing counsel.

(2) Jury instruction requests must be in writing and state in full the instruction requested. Each request shall be upon a separate sheet of paper, the original and copies of which shall be free from red lines and firm names and shall be entitled:

"Instruction No. ____"

The number of the request shall be written in lead pencil

(3) If case citations are used in support of a requested instruction, at least one copy of the requested instruction furnished to the court shall be submitted without the citations. Citations may be provided upon separate sheets attached to the particular instruction to which the citation applies. (Amended effective January 15, 1990.)

Rule 4-504

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

Utah Rules of Civil Procedure

Rule 52(a)

(a) Effect. In all actions tried upon the facts . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.

STATEMENT OF CASE

A. NATURE OF THE CASE

This case is a defamation action in which Petitioner, Lynn A. Jenkins, alleges that the Respondent, Elaine B. Weis, defamed him by slanderous utterances which were also libel per se; intentional infliction of emotional distress and for invasion of privacy - casting Petitioner in a false light. Respondent was sued in her individual capacity inasmuch as the statements made were not within the delegated authority of the Commissioner of Financial Institutions of Utah and did not raise to the level of an issue which concerned the public interest. [See Title 7, Chapter 1, Utah Code Annotated, as amended.] The State of Utah was not made a party to this action.

B. STATEMENT OF FACTS

July 22, 1982, the Respondent, as Commissioner, took possession of the business and property of Murray First Thrift and Loan Company (hereinafter "MFT&L") pursuant to Title

7, Chapter 2 Utah Code Annotated (1981) as an administrative proceeding styled as: In the Matter of the Possession by the Banking Commissioner of Murray First Thrift and Loan, a Utah Corporation, Civ. No. 820905951 (hereinafter "MFT&L Administrative Possessory Proceeding").

In or about February 1986, Petitioner contacted Respondent, in her official capacity as Commissioner, about MFT&L's failure to provide health and accident insurance on Petitioner in 1980 when he and his wife obtained two loans from MFT&L. Later that month, Respondent as Commissioner, rejected the Petitioner's and his wife's MFT&L claim as not being timely filed and without merit through her counsel, Bryce H. Pettey, Assistant Attorney General.

In March 1986, the Petitioner informed the Respondent, as Commissioner, that it appeared the Industrial Loan Guaranty Corporation of Utah (hereinafter "ILGC") would collapse because of

her actions in the MFT&L matter and fraudulent or misstated accounting representations to the MFT&L Administrative Possessory Proceeding.

Sunday, April 6, 1986, the Petitioner appeared on KTKK's talk radio program with communicator Neil Davis for about 50 minutes to discuss the MFT&L Administrative Possessory Proceeding and the problems he perceived were associated with an application of First Security Financial (hereinafter "FSF") to become a member of the Federal Reserve System.

July 31, 1986, the Respondent as Commissioner, seized the ILGC, in an action styled as: In The Matter Of The Possession By The Banking Commissioner Of The Industrial Loan Guaranty Corporation of Utah, Civ. No. 860905024 (hereinafter "ILGC") by a sealed state District Court order, which effectively collapsed seven or eight thrift and loan companies that were members of the ILGC.

Petitioner, on his own behalf and with other concerned failed thrift depositors

developed a plan which they believed might resolve the ILGC crisis and presented that plan to the Commissioner and her staff as a possible resolution of the thrift crisis through MFT&L's attorneys and Depositors' representatives. From August through December 1986, Petitioner worked with several individuals to obtain an accounting on the MFT&L Administrative Possessory Proceeding, the failed thrifts and ILGC, during which time he had direct contact with Respondent and her staff. In early January 1987, the Petitioner petitioned the state District Court, the Hon. Richard H. Moffat, judge presiding, to unseal the ILGC filing and a contingent matter and styled as: In The Matter Of The Possession By The Banking Commissioner Of The Thrift Holding Company, Civ. No. 860905221 (the holding company of Charter Thrift and Loan Company). Judge Moffat granted this request.

On or about January 14, 1987, in an interview with KUTV, Channel 2 the Respondent published defamatory statements concerning the

Petitioner. The broadcast statements, transcribed, were as follows:

> MICHELLE KING: Neither depositors nor state officials are happy about this latest turn of events. It's sure to strain even further the already difficult relations between both sides. As KUTV's Rick Shenkman reports the controversy has now turned openly bitter, pitting a key leader of depositors against Financial Commissioner Elaine Weis.
>
> RICK SHENKMAN: They were never friendly but now they're virtual enemies. Elaine Weis, Commissioner of Financial Institutions, Lynn Jenkins, one of the key leaders of the thrift depositors.
>
> LYNN JENKINS: I don't like the word "liar". I like to just say that she has been less than honest. There has been a complete conspiracy of silence by the Commissioner in (sic) the Financial Institution (sic) since the day she came on board.
>
> ELAINE WEIS: I would feel sorry for Lynn Jenkins because I think he's a mentally deranged person. (emphasis added)
>
> RICK SHENKMAN: From the beginning of the thrift controversy it was almost certain to turn bitter. The state says depositors should only receive between 27 cents and 68 cents on the dollar, depositors feel the state owes them 100 cents on the dollar because the state set up the now-defunct corporation that was supposed to guarantee their money, but no one could have predicted things would get this bad.

ELAINE WEIS: In my opinion he's a paranoid schizophrenic, and I would feel sorry for him, but he's such a vicious, vicious, person that I can't and I wish I could. (emphasis added)

LYNN JENKINS: I need Commissioner Elaine Weis under oath because she fails to live up to anything that she says verbally. She needs to be more forthright and honest with the people.

ELAINE WEIS: I hope he's not prone to violence because I really am afraid, of some, a, you know, not attack on me but my family. (emphasis added)

LYNN JENKINS: I have never had a violent record in my life. She has nothing to fear from me except for the truth.

RICK SHENKMAN: The thrift issue was not the first one to engage Jenkins and Weis in battle. They've been locked in dispute since Weis took over Murray First Thrift in 1982. Jenkins had a mortgage with Murray First Thrift. He lost his mortgage and his home after the institution closed. He blames Weis saying she blocked a settlement that would have saved him and his family. He denies he's got a vendetta. She says she suspects [he does. Rick Shenkman, KUTV News.][1]/

February 11, 1987, Petitioner, Through Sharon Green, Esq., demanded a retraction of the Respondent's above statements which she and her counsel, the Attorney General, refused and

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[1]. Added at trial.

continue to refuse to do as of this date.

April 16, 1987, Petitioner filed suit against Respondent, as an individual for Defamation (Count I), Intentional Infliction of Emotional Distress (Count II) and Invasion of Privacy - Casting [Petitioner] In a False Light (Count III).

January 19, 1988, the Respondent filed a "Motion for Summary Judgment" to dismiss this action and at hearing on January 29, 1988 the trial court ruled: (a) The Petitioner was not a public figure; (b) the cause of action against the Respondent was an individual capacity suit; (c) defamation, intentional infliction of emotional distress and invasion of privacy - casting Petitioner in a false light were outside Respondent's delegated or statutory authority as Commissioner.

March 25, 1988, a hearing was held on the Respondent's objections to Petitioner's proposed Order pursuant to the January 29, 1988 court hearing. At this time, the trial court ordered,

"that if the Petitioner's claims are true, then the Respondent is not protected by governmental immunity."

April 20, 1988, the trial court entered its Order stating in part, "Plaintiff had requested the Utah Attorney General not to defend Weis in the cause of action since it was against her as an individual".

May 7, 1990, by "Minute Entry" the trial court found, as a matter of law, concerning Respondent's statements:

> The statute provides that a libel is a malicious defamation, expressed either by printing or by signs or pictures or the like . . .; . . . even if the defamation is a slander, I believe it falls within the category of slander per se. Although the statements do not have a direct reference to the plaintiff's business, it is certainly incompatible for a businessman to be a paranoid schizophrenic, a vicious person and prone to violence.

The trial court entered its "Order" on May 14, 1990, supported by its findings.

May 31, 1990, the trial judge, by "Minute Entry", found as a matter of law that Petitioner was a "public figure".

June 4, 1990, the jury trial commenced and June 6, 1990, the trial court, on its own motion, dismissed Petitioner's Second (Intentional Infliction of Emotional Distress) and Third (Invasion of Privacy - Casting [Petitioner] In a False Light) Causes of Action. This was done without findings of fact or conclusions of law or order and upon the Judge's own motion.

June 7, 1990, the Jury, after deliberating less than one hour, returned a verdict that found the Respondent had made defamatory statements against the Petitioner, but that the statements were true.

C. REASONS FOR GRANTING THE WRIT

1. DID UTAH'S SUPREME COURT AND COURT OF APPEALS ERR IN UPHOLDING THE TRIAL COURT'S DETERMINATION THAT PETITIONER WAS A PUBLIC FIGURE WITHOUT APPROPRIATE FINDINGS OR LEGAL BASIS FOR SUCH DETERMINATION?

The issue of whether the trial court abused its discretion by declaring Petitioner to be a public figure, without findings of fact or conclusions of law or order is solely a question

of law reviewable under the "correction-of-error" standard. See Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P. 2d 1376 (Utah 1987); Cornish Town v. Koller, 798 P.2d 753 (Utah 1990). Part and parcel of this is whether the Petitioner, if a public figure, is he held to the same degree of Public Figure status as Respondent and the statements made of public interest to know. See: Rosenblatt v. Baer, 386 U.S. 75, 86 S.Ct. 699, 15 L.Ed.2d 597 (1966).

2. DID UTAH'S SUPREME COURT AND COURT OF APPEALS ERR IN UPHOLDING THE TRIAL COURT'S DISMISSAL OF TWO OF PETITIONER'S THREE CAUSES OF ACTION WITHOUT MOTION BY OPPOSING PARTY DURING TRIAL ON THOSE MATTERS AND WITHOUT AFFORDING PETITIONER THE OPPORTUNITY TO PRESENT EVIDENCE, MEMORANDUM OR ARGUMENT THERE ON?

The trial court abused its discretion in dismissing, during the Jury trial, and without prior notice, Counts Two and Three of the Complaint. This issue is reviewable under the "abuse of discretion" standard. See: Heathman v. Fabian, 377 P.2d 189 (Utah 1962).

3. DID UTAH'S SUPREME COURT AND COURT OF APPEALS ERR IN UPHOLDING THE TRIAL COURT'S JURY INSTRUCTIONS, SUCH AS TO THE TRUTH, WHICH REQUIRED THE JURY TO MAKE DETERMINATIONS AND RULINGS AS TO A MATTER OF LAW?

The trial court abused its discretion in its instructions to the jury in light of the defamation cause of action, as to facts, actual malice, burden of scientific proof, criminal behavior and truthfulness of the Respondent's libelous per se opinions. Were the Respondent's opinions supported by the evidence presented under "scientific principle or discovery" or was the evidence introduced "unfairly prejudicial" that appealed "to the jury's sympathies, aroused its sense of honor, provoked its instinct to punish or otherwise caused [the] jury to base its decision on something other than the facts of the case?" See: Seegmiller v. KSL, 629 P.2d 968 (Utah 1981); Van Dyke v. KUTV, 663 P.2d 52 (Utah 1983); Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); Waldbaum v. Fairchild Publications, Inc., 627

F.2d 1287 (D.C. Cir. 1980) cert denied 101 S.Ct. 266; Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 477 U.S. 242, 91 L.Ed.2d 202 (1986); Clyburn v. New World Communications, Inc., 903 F.2d 29 (D.C. Cir. 1990); Milkovich v. Lorain Journal Co., 497 U.S., 1, 111 L.Ed.2d 1, 110 S.Ct. 2695 (1990); and Utah Rules of Evidence, Rule 702.

Additionally, the trial court abused its discretion in charging the Jury and then changing the Jury Instructions, as it presented those instructions to the Jury on the instruction regarding truth, facts, conclusions of law and actual malice. Note: Jury Instruction No. 32, and See: Christenson v. Jewkes, 761 P.2d 1365 (Utah 1988); supra Milkovich and Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983).

4. DID UTAH'S SUPREME COURT AND COURT OF APPEALS ERR IN UPHOLDING THE TRIAL COURT'S ALLOWANCE OF THE UTAH ATTORNEY GENERAL TO REPRESENT THE RESPONDENT AND IN ALLOWING MEMBERS OF THE UTAH ATTORNEY GENERAL'S STAFF TO TESTIFY AT TRIAL?

The representation by the Attorney General was wrong, inasmuch as the Respondent was being sued in her individual capacity. See, Kentucky v. Graham 473 U.S. 159, 87 L.Ed.2d, 14, 105 S.Ct. 3099, Hafer v. Melo, 112 S.Ct. 358 (1991), Watkiss & Campbell, 808 P.2d 1061 (Utah 1991), Utah State Constitution, Article VII Section 15, Utah Code Annotated §67-5-1 et seq.

5. DID UTAH'S SUPREME COURT AND COURT OF APPEALS ERR IN UPHOLDING THE TRIAL COURT'S ALLOWANCE OF UNTIMELY PRE-TRIAL MOTIONS IN DEROGATION OF THE RULES OF THE UTAH CODE OF JUDICIAL ADMINISTRATION?

The Respondent made a motion to declare Petitioner a public figure as reflected above, a procedural error which denied Petitioner due process, i.e. Jury Instructions are mandated pursuant to Utah Code of Judicial Administration, Rule 4-503, five days before the trial. Thus, the whole complexion of the trial court's jury proceeding changed.

ARGUMENTS TO QUESTIONS PRESENTED

I. UTAH'S SUPREME COURT AND COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S DETERMINATION THAT PETITIONER WAS A PUBLIC FIGURE WITHOUT APPROPRIATE FINDINGS OR LEGAL BASIS FOR SUCH DETERMINATION.

The Respondent, in a televised KUTV-2 interview, aired on the 6:00 p.m. news of January 14, 1987, made the following comments concerning the Petitioner:

A. I would feel sorry for Lynn Jenkins because I think he's a mentally deranged person. (emphasis added)

B. In my opinion he's a paranoid schizophrenic, and I would feel sorry for him, but he's such a vicious, vicious, person that I can't and I wish I could. (emphasis added)

C. I hope he's not prone to violence because I really am afraid, of some, a, you know, not attack on me but my family. (emphasis added)

The trial court found these statements to constitute slander and due to their electronic publication, found them to constitute libel per se. The determination that a matter is defamation per se shifts to the Petitioner, as a public figure, the burden of proof at trial

which includes the following standards:

> Supra: Seegmiller at 977. . . Section 45-2-3 sets forth five types of communication which are subject to the protection of a privilege. See also §45-2-10. Two are absolute, and three are conditional, being applicable only in the absence of malice. . .
> id. at 978. . . To extend the concept of a qualified privilege to mere allegations of criminal conduct is impermissible for two reasons. First, since §45-2-3(4) and §45-2-10(3) limited the privilege to actual, official charges of criminal conduct, there is a clear implication that mere allegations of conduct which might be violative of the criminal law should not be construed to fall within the privilege. By setting the boundaries as it did, the Legislature must have intended that allegations of criminal conduct not buttressed by official action should not be included within the privilege. Indeed, allegations of criminal conduct, being particularly damaging to a reputation, have historically been treated as slanderous per se under the common law... Nor can the strictness of the above provisions be avoided by invoking the "public benefit" qualified privilege provided in §§45-2-3(5) and 45-2-10(4)... The "public interest" privilege is applicable, at least, when the public health and safety are involved and when there is a legitimate issue with respect to the functioning of governmental bodies, officials, or public institutions, or with respect to matters involving the expenditure of public funds. Of course the New York Times standard of malice would have to be proved in any event if the plaintiff were a public official or public figure, . . .

Although the trial court had entertained various motions in this action, including a Motion for Summary Judgment in January 1988, the Respondent made no motion to have Petitioner declared a "Public Figure" until May 28, 1990 [2]/, the week before trial commenced. This should be considered a procedural sham. The declaration of the trial court that the Petitioner was a Public Figure is a critical legal determination. The Utah's Supreme Court has established a simple test concerning status as a public official and the trial court's responsibilities, see: Van Dyke at 55:

> . . . We note at the outset that "as is the case with privileges generally it is for the trial judge in the first instance to determine whether the proofs show [the plaintiff] to be a 'public official.'" Rosenblatt, supra, 86 S.Ct. at 677 (footnote omitted). If there is competent evidence to support that finding, we are bound to abide by the trial court's ruling. If, on the other hand, the proofs show that Van Dyke was a private individual, the negligence standard promulgated under Seegmiller, supra, prevails and the case must be remanded for

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[2]. The trial court record does not include the Respondent's Memorandum or attachments.

a new trial.

> . . . As we construe Rosenblatt, a two-step analysis is in order: (1) The libeled individual must occupy a position which invites public scrutiny absent any defamatory charges, before the label of "public official" may attach to him. (2) Next, and only then, may the defamatory comment which must relate to his conduct in that position enjoy the constitutional, qualified privilege. (emphasis added)

The Van Dyke Test has been amplified by the D.C. Circuit Court of Appeals to identify what the Petitioner believes is the standard under which he must be tested as a "Limited-purpose Public Figure". Supra: Clyburn at 31:

> In Waldbaum v. Fairchild Publications, Inc. 627 F.2d 1287, 1296-98 (D.C. Cir. 1980), we formulated a three-part test for identifying a limited-purpose public figure, requiring (1) that there have been a public controversy; (2) that the plaintiff have played a sufficiently central role in the controversy; and (3) that the alleged defamatory statement have been germane to the plaintiff's participation in the controversy. See Tavoulareas v. Piro, 817 F.2d 762, 771-75 (D.C. Cir. 1987)(en banc)(applying Waldbaum test). (emphasis added)

The rights of fair comment concerning a public figure are substantially different than those made concerning a private person. Indeed, once a determination is made that the comments

constitute defamation per se, and the slander is directed against a private person, the only issue to be determined at trial is damages. The Court in Milkovich 111 L.Ed.2d at 20 held as to damages:

> The numerous decisions discussed above establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognize that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, 383 US 75, 86, 16 L. Ed.2d 239, 86 S.Ct. 1170 (1966). Justice Stewart in that case put it with his customary clarity:
>
> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty."
>
> "The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." (emphasis added)

The critical point in the trial court's process occurred when it determined Petitioner's status as a "Public Figure", which came less than five days prior to the start of the jury trial, and specifically overruled the trial court's April 20, 1988 Order, without findings, conclusions of law, order or trial court's recorded transcript.

Thus, in this case the Utah Supreme Court's decision in Van Dyke seems absolutely controlling as to Public Figure status inasmuch as the parties were being interviewed about their private lives and their respective stresses or frustrations.

As to Elaine Weis' opinion, the Court in Milkovich 111 L.Ed.2d at 17 ruled:

> The Court has also determined "that in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Bose Corp. v. Consumers Union of United States, Inc. 466 US 485, 499, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984) (quoting New York Times, 376 US, at 284-286, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 ALR

2d 1412). "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." Harte-Hanks Communications, Inc. v Connaughton, 491 US, 657, 105 L.Ed.2d 562, 109 S.Ct. 2678 (1989). (emphasis added)

> . . . [w]e think the " `breathing space'" which "`freedoms of expression require in order to survive,'" Hepps, 475 US, at 772, 89 L.Ed.2d 783, 106 S.Ct. 1558 (quoting New York Times, 376 US, at 272, 11 L.Ed. 2d 686, 84 S.Ct. 710, 95 ALR 2d 1412), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact. (emphasis added).

It is beyond the stretch of Petitioner's imagination, in reviewing the Respondent's statements, to conclude that calling one a paranoid schizophrenic, mentally deranged, or a vicious person who would harm one's family, was proven truthful based on the opinions of the witnesses who were called to testify. Also, it is beyond any credibility to suggest that those statements rise to the level of issues of Utah's Thrift Crisis.

II. UTAH'S SUPREME COURT AND COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S DISMISSING OF TWO OF PETITIONER'S THREE CAUSES OF ACTION WITHOUT MOTION BY OPPOSING PARTY

DURING TRIAL ON THOSE MATTERS AND WITHOUT AFFORDING PETITIONER THE OPPORTUNITY TO PRESENT EVIDENCE, MEMORANDUM OR ARGUMENT THERE ON.

Utah's Supreme Court and Court of Appeals erred in not following the intended purpose of the Utah Code of Judicial Administration.

Heathman at 191, supra, ". . . No one has an inalienable or constitutional right to a judgment by default without a hearing on the merits. The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case."

III. UTAH'S SUPREME COURT AND COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S JURY INSTRUCTIONS, SUCH AS TO THE TRUTH, WHICH REQUIRED THE JURY TO MAKE DETERMINATIONS AND RULINGS AS TO A MATTER OF LAW.

The trial court's "Jury Instructions", Instruction No. 1 through No. 32, at best must have been confusing to the Jury. See: Nielsen v. Pioneer Valley Hospital et al. 830 P.2d 270-274, 275 (Utah 1992), states:

> The confusion created by these instructions may well have denied Nielsen

a fair trial. "What the party is entitled to is a presentation of the case to the jury under instructions that clearly, concisely, and accurately state the issues and the law applicable thereto so that the jury will understand its duties" . . . (cite omitted) . . . Thus, special effort to simplify and clarify the instructions was essential.

Petitioner points to an absolute in this case that the Jury did not understand its Instructions. The Court is referred to the "Special Verdict" form, Numbers 1 and 2.

Utah's Supreme Court in Seegmiller at 976, supra, stated:

. . .[F]inding that defendant had published no false statements, and ruling that truth is an absolute defense, this Court stated that, "it is deemed unnecessary to consider plaintiff's allegation" . . ./. . . Although there may be cases which are so flagrant that expert testimony may not be required, the important interests to be protected, which are founded in the First Amendment, require that juries not be allowed to conclude that because a false, defamatory statement was published, negligence must therefore have occurred. Res ipsa loquitur must be employed with great care. . . . Evidence of custom within the profession of news dissemination would normally come from an expert who has been shown to be qualified on the subject. . . In the absence of expert testimony, however, the court should be cautious in permitting the doctrine of res ipsa loquitur to take the case to the jury and permit the jury, on the basis of its own

lay inferences, to decide . . . (emphasis added)

In other words, Utah law provides there can be no defamatory statement if it is true.

The Petitioner believes if the trial court's verdict and the judgment of Utah's Supreme Court and Court of Appeals stand, then every citizen in Utah should fear Utah's body politic, because they would be at risk for similar injury if they undertook to enjoy and defend their lives and liberties as outlined in the Utah State Constitution Article I, Section 1. and Section 2.

In Petitioner's opinion, the doctrine of res ipsa loquitur, ("the thing speaks for itself"), when a statement is interpreted as a loathsome disease in a defamatory utterance, the Utah Rules of Evidence as a matter of law must use the testimony of an expert. See: William Daubert, et ux., et al., v. Merrell Dow Pharmaceuticals, Inc.

Petitioner represents to the Court, in part, as to ordinary witness vs. expert witness

as in Daubert at 2795:

> . . . The primary locus of this obligation is Rule 702, [expert witness] which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify.
> . . . The subject of an expert's testimony must be "scientific knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds. . . . But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation -- i.e., "good grounds", based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

At 2796:

> . . . Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

> . . . Unlike an ORDINARY WITNESS, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on first-hand knowledge or observation.

> . . . Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be

whether it can be (and has been) tested. . . ("[T]he statements constituting a scientific explanation must be capable of empirical test"). . . . ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability").

At 2798:

. . . Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication.

At 2799:

. . . Finally, Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . . "

. . . . It is true that open debate is an essential part of both legal and scientific analyses. Yet <u>there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory</u>.

Utah's Supreme Court also has determined the expert witness standard. See <u>State v. Rimmash</u>, 775 P.2d 388 (Utah 1989).

Further, Petitioner believes that only the first sentence of the Utah Constitution Article I, Section 15, protects Respondent and the second sentence only applies to <u>"all criminal prosecution"</u>.

IV. UTAH'S SUPREME COURT AND COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S ALLOWANCE OF THE UTAH ATTORNEY GENERAL TO REPRESENT THE RESPONDENT AND IN ALLOWING MEMBERS OF THE UTAH ATTORNEY GENERAL'S STAFF TO TESTIFY AT TRIAL.

May 1, 1987, Petitioner's then attorney of record, Ray G. Martineau, Esq., sent a letter to Assistant Attorney General, William F. Bannon, Esq., which stated in part, "our client does not believe that the State of Utah can lawfully provide or pay for any legal services relating to the defendant's involvement in the subject litigation." Mr. Bannon responded to Mr. Martineau's letter, in or about May 5, 1987 responding in part, "You may assume that the State of Utah will be undertaking the defense of former Commissioner Weis."

The Utah Constitution Article VII, Section 15, establishes the constitutional duties of the Attorney General. Further, Utah Code Annotated, Title 67, Chapter 5, establishes the statutory functions of the Attorney General.

The representation of the Respondent by the

Attorney General, Petitioner asserts, violates, at least, the United States Constitution Amendment XIV Section 1. Neither the Petitioner, nor any average citizen, could afford the level of credible or legal representation afforded the Respondent by the Attorney General's staff and its resources. In reality, the taxpayers of Utah are funding Mrs. Weis' civil litigation fees and this system lacks fairness. Furthermore, Respondent, being represented by the Attorney General at trial with the credibility inherently implied in that office, would undoubtedly communicate a strong and inequitable influence to the Jury and thereby unjustly influence its verdict. The trial court heard this argument at great length, but refused to act.

Utah's Supreme Court in State v. Thompson, 810 P.2d 415 (Utah 1991) ruled as a matter of law the Attorney General's liability in violating Constitutional Law, at 420:

> As the state's highest law enforcement officer, the attorney general is expected

to perform his discretionary functions within constitutional bounds. To shield his conduct behind the vagueness of a legislative grant of authority would be tantamount to a grant of immunity to act unconstitutionally.

And, Petitioner is of the opinion that the Commissioner of Financial Institutions falls within the same category as the Thompson mandate.

Further, the Attorney General is chargeable for his unethical behavior toward the Petitioner, pursuant to Utah Rules of Professional Conduct.

V. UTAH'S SUPREME COURT AND COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S ALLOWANCE OF UNTIMELY PRE-TRIAL MOTIONS IN DEROGATION OF THE RULES OF THE UTAH CODE OF JUDICIAL ADMINISTRATION.

As set out specifically in Point I above, the Respondent's "Motion To Declare Petitioner a Public Figure", the most glaring rule violation is Utah Code of Judicial Administration 4-503, which speaks for itself as to timeliness, fairness and due process.

It was humanly impossible for the

Petitioner's then attorney, Harold R. Stephens, a sole practitioner, to prepare for a different type of jury trial in less than (4) four days of the trial date, and Petitioner is of the opinion the trial court should have continued the jury trial date.

CONCLUSIONS

At the jury trial in this matter, the Petitioner called witnesses on his own behalf who testified concerning his involvement with various depositors' groups and individuals, and one expert, psychiatrist Robert C. Mohr, M.D., who testified that he found no sign of any mental illness in Petitioner. The Respondent called witnesses, including members of the Attorney General's staff, who testified concerning their opinions of Petitioner and Respondent's state of mind concerning how she might have formed her opinions or beliefs of the Petitioner. No experts were called by the Respondent and the trial court allowed the hearsay opinions to be published to the Jury.

The trial judge in trying to allow for these last minute maneuvers lost sight of the requirements of the Rules of Judicial Administration and failed to provide reasonable or adequate findings upon which to base his decisions. This is a clear abuse of discretion and judicial error and are the grounds for this Petition.

Petitioner contends that on the critical issue of his status as a "Public Figure" the trial court must, as required by Van Dyke, supra, provide findings and appropriate conclusions of law both as to why he was a "Public Figure" and in this instance, how the statements made remotely relate to that status.

The trial court's submission of Jury Instructions which were both unclear, and required the Jury to consider rulings on issues of law was again an abuse of discretion and is judicial error. Further, there was no justification for the trial court's dismissal of two of the Petitioner's causes of action without

findings or conclusions.

Lastly, the Attorney General's representation of the Respondent and calling of witnesses from that office, which is a clear violation of the Utah law, and in light of the trial court's findings that the Respondent's statements were outside the course and scope of her employment, in Petitioner's opinion, cloaked these statements with the sanctity of the State by using the auspices of high state offices, to slander and defame the Petitioner and then further compounding that by tendering a defense through the chief legal officer of the State of Utah is unwarranted and should not be allowed. The chilling impact on an individual's right to express himself if he is to face these kinds of statements are obvious. Without detailing the impact that those statements have had on Petitioner or his family, it would be safe to conclude that the Respondent's opinion, freely expressed, has had a far greater impact on Petitioner than the fears Respondent enunciated

to an interstate television audience. All testimony presented to prove the truth was without basis or supporting evidence.

WHEREFORE, Petitioner prays this Honorable Court reverse Utah's Supreme Court and Court of Appeals majority judgment and remand it to Utah's Supreme Court.

Dated this 3rd day of January, 1995.

Lynn A. Jenkins I.
Petitioner, pro se.

APPENDIX A

868 P.2d 1374, Jenkins v. Weis, (Utah App. 1994)

Lynn A. JENKINS, Plaintiff and Appellant,
v.
Elaine B. WEIS, Defendant and Appellee.

No. 920652-CA.
Court of Appeals of Utah.
Jan. 7, 1994.
Rehearing Denied Feb. 14, 1994.

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John Michael Coombs, Salt Lake City, for plaintiff and appellant.

Jan Graham and Debra J. Moore, Salt Lake City, for defendant and appellee.

Before BENCH, JACKSON and GARFF, [1] JJ.

OPINION

JACKSON, Judge:

Appellant Lynn Jenkins brought an action against Elaine Weis for defamation, intentional infliction of emotional distress, and invasion of privacy. Jenkins appeals the jury verdict in favor of Weis. He also challenges several rulings by the trial court. We affirm.

FACTS

On January 16, 1987, a local television station aired a story concerning Utah's thrift crisis, which involved the insolvency of several savings and loan institutions in Utah along with

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[1] Senior Judge Regnal W. Garff, acting pursuant to appointment under Utah Code Ann. Sec. 78-3-24(10) (1992).

state-owned corporations that guaranteed their deposits. The broadcast included the following portions of a pre-taped interview with Elaine Weis, Commissioner of Financial Institutions:

MICHELLE KING: Neither depositors nor state officials are happy about this latest turn of events. It's sure to strain even further the already difficult relations between both sides. As KUTV's Rick Shenkman reports the controversy has now turned openly bitter, pitting the key leader of depositors against Financial Commissioner Elaine Weis.

RICK SHENKMAN: They were never friendly but now they're virtual enemies. Elaine Weis, Commissioner of Financial Institutions, Lynn Jenkins, one of the key leaders of the thrift depositors.

LYNN JENKINS: I don't like the word "liar." I like to just say that she has been less than honest. There has been a complete conspiracy of silence by the Commissioner in the financial institution [sic] since the day she came on board.

ELAINE WEIS: I would feel sorry for Lynn Jenkins because I think he's a mentally deranged person.

RICK SHENKMAN: From the beginning of the thrift controversy it was almost certain to turn bitter. The state says depositors should only receive between 27 cents and 68 cents on the dollar, depositors feel the state set up the now-defunct corporation that was supposed to guarantee their money, but no one could have predicted that it would get this bad.

ELAINE WEIS: In my opinion, he's a paranoid schizophrenic, and I would feel sorry for him, but he's such a vicious, vicious person that I can't and I wish I could.

LYNN JENKINS: I need Commissioner Elaine Weis under oath because she
- Page 868 P.2d 1376 -
fails to live up to anything that she says verbally. She needs to be more forthright and honest with the people.

ELAINE WEIS: I hope he's not prone to violence because I really am afraid, of some, a, you know, not attack on me but my family.

LYNN JENKINS: I have never had a violent record in my life. She has nothing to fear from me except for the truth.

In April 1987, Jenkins filed a complaint against Weis alleging defamation, intentional infliction of emotional distress, and invasion of privacy based on the above remarks. On May 29, 1990, Weis filed a motion for designation of Jenkins as a public figure. On May 31, 1990, the trial court ruled by minute entry that Jenkins was a public figure. The case was tried before a jury and after Jenkins presented his evidence and rested his case, Weis moved for a directed verdict. The parties argued the motion and the court ruled. As part of its ruling, the court, on its own motion, dismissed Jenkins's claims of invasion of privacy and intentional infliction of emotional distress. Weis presented her evidence, including several witnesses who testified concerning Jenkins's behavior.

The jury returned a verdict of no cause of action on the defamation claim, finding that although Weis had published defamatory statements about Jenkins, the statements were true. After entry of judgment, Jenkins's motions for new trial and judgment notwithstanding the verdict were denied. Jenkins appeals.

ISSUES

Jenkins claims the trial court improperly: (1) determined that he was a public figure; (2) dismissed two of his causes of action sua sponte; (3) submitted erroneous jury instructions; (4) allowed the state attorney general's office to represent Weis and allowed members of the attorney general's staff to testify at trial; and (5) decided pretrial motions within five days of trial.

ANALYSIS

Public Figure Ruling

Jenkins claims the trial court improperly determined he was a public figure. Weis claims that even if the trial court improperly determined Jenkins was a public figure, its ruling was harmless and thus, should not be disturbed. See Utah R.Civ.P. 61 (1992); Huston v. Lewis, 818 P.2d 531, 533 (Utah 1991); State v. Verde, 770 P.2d 116, 120 (Utah 1989); Steffensen v. Smith's Management Corp., 820 P.2d 482, 489 (Utah App.1992), aff'd, 862 P.2d 1342 (Utah 1993). We agree. An error is harmful only if there is a "reasonable likelihood that the error affected the outcome of the proceedings." Steffensen, 820 P.2d at 489. The jury found that Weis's statements were true and truth is an absolute defense to a defamation claim. Brehany v. Nordstrom, Inc., 812 P.2d 49, 57 (Utah 1991). Thus, regardless of whether Jenkins is a public figure, if Weis's statements were true, Jenkins has no claim for defamation. Accordingly, a ruling that Jenkins was not a public figure would not have changed the outcome of the trial and any error by the trial court in its public figure ruling would be harmless.

In the middle of Jenkins's public figure argument in his brief, he alleges that all testimony was opinion testimony and was "not

supported by any scientific conclusion or expert testimony." The dissent takes this statement and completely recasts Jenkins's public figure argument into a challenge to the sufficiency of evidence supporting the jury verdict that Weis's defamatory statements were true. The dissent states that "Jenkins asserts that there is no evidence" to support the verdict of truth. (Emphasis added.)

That statement is contrary to the assertions that Jenkins makes in his brief albeit in his "public figure" argument. Jenkins asserts in his brief that "it must be pointed out that all testimony [to support the truth of the statements] was opinion and not supported by any scientific conclusion or expert testimony." Further, Jenkins states that "[i]t is beyond the stretch of imagination in reviewing [Weis's] statements to conclude that [the statements] were proven truthful based on

the opinions of the witnesses who were called to testify." Jenkins does not say there is no evidence; he says evidence exists but he does not believe it because it is not scientific or expert. [2] Neither Jenkins nor the dissent cites any legal authority to support the conclusion that the jury could not consider testimony of lay persons regarding the truth of

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[2] In fact, Jenkins's expert witness, Dr. Mohr, testified that "people with disordered thinking patterns have a tendency to see conspiracies against them." Thus, the jury could infer from the testimony of Jenkins's expert that because there was testimony that Jenkins saw conspiracies against him, his thinking patterns were disordered.

the statements. [3]

Although Jenkins failed to supply us with a transcript of any of the trial proceedings or testimony (an indication that he was not making a direct challenge to the sufficiency of the evidence, because we need a transcript to review the evidence on such a challenge), he did insert in his brief a summary of the trial testimony supporting the truth of Weis's statements. This evidentiary summary was prepared by Weis's counsel in connection with the post-trial motions and is found in the record on appeal. Moreover, in Jenkins's brief he "accepts the summary of the witnesses' testimony which was submitted." Accordingly, we set forth his evidentiary summary in full:

"I hope he's not prone to violence because I really am afraid, of a, you know, not attack on me but my family."

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[3] The dissent cites one bench trial case, Alpar v. Weyerhaeuser Co., 20 N.C.App. 340, 201 S.E.2d 503, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974), for the proposition that calling an individual "clinically paranoid" is a diagnosis that requires expert testimony to verify the condition. However, contrary to the dissent's representations, Alpar does not suggest that expert testimony is required to establish or rebut truth. Further, the case does not state that the judge could not consider lay testimony in his determination of truth. Moreover, unlike the statements made in Alpar, Weis never alleged Jenkins was "clinically" paranoid or schizophrenic.

Further, we disagree with the dissent's assertion that calling an individual a "paranoid schizophrenic" is necessarily a clinical diagnosis.

1. Weis testified that she observed Jenkins express anger and rage in her presence.

2. Weis testified that Jenkins verbally abused her secretary at the Department of Financial Institutions.

3. Weis testified that Jenkins publicly accused her of being a criminal at the October, 1986 meeting of the depositors of the failed thrifts.

4. Jenkins and others stated that Jenkins sought the excommunication of Assistant Attorney General Bryce Pettey and attorney Don Allen from the L.D.S. Church.

5. Jenkins sought a criminal investigation of Elaine Weis.

6. Robert Eves testified that Jenkins slandered the title to property his company sought to develop.

7. Weis and George Sutton testified about incidents in which security guards were called to Department of Financial Institutions offices to deal with Jenkins.

8. Weis, Allen and Pettey all testified they feared Jenkins would harm their families.

9. Jenkins called Weis a criminal on the April 1986 KTKK radio broadcast.

10. An employee of the Utah Lt. Governor's office required Jenkins to bring a security guard with him when he visited the office.

"I think he's a mentally deranged person. "

Weis testified that by saying this she meant Jenkins had disorganized thinking. The following is evidence that demonstrates the

truth of that statement.

1. Weis testified that Jenkins' writings were incomprehensible.

2. Weis testified that Jenkins' plan to reorganize the failed thrifts violated every banking canon.

3. George Sutton testified that Jenkins is irrational and crazy.

4. Robert Eves testified that Jenkins is an "angry kook" and is the kind of person who tells himself the same story so many times that he starts to believe it.

5. Don Allen testified that Jenkins cannot process information without twisting facts and attacking people.

6. Jenkins was given opportunity to receive title to the house he lost in foreclosure but refused the offer on principle.

7. Jenkins buried his invented satellite dish in a garbage dump to preserve the secrecy of the invention.

8. At a time Jenkins was in default on his house mortgage he settled a property dispute and recovered $80,000. He invested the $80,000 in a business, Iron Star Manufacturing, instead of curing the default. He eventually abandoned the business a few months later.

"In my opinion he's a paranoid schizophrenic."

Weis testified that by saying this she meant Jenkins was a person who sees plots because of his irrational thinking. The following is substantial evidence of the truth of this statement.

1. Plaintiff spoke of international criminal conspiracies on the KTKK radio broadcast. The conspiracies involved Weis, Judges of the Third District Court, federal judges, the FBI and organized crime.

2. Plaintiff told Robert Eves that Weis and Judge D. Frank Wilkins were conspiring against Eves to cheat him out of a $4 million real estate investment.

3. Dr. [Mohr], plaintiff's expert, testify (sic) that people with disordered thinking patterns have a tendency to see conspiracies against them.

Contrary to the dissent's claim of no evidence, the foregoing reveals an evidentiary basis for the jury's truth verdict. [4] "We accord due deference to the jury as the fact finder and do not substitute ourselves in this role." Evans ex. rel. Evans v. Doty, 824 P.2d 460, 468-69 (Utah App.1991), cert. denied, 836 P.2d 1383 (Utah 1992) (quoting Israel Pagan Estate v. Cannon, 746 P.2d 785, 793 (Utah App.1987), cert. dismissed, 771 P.2d 1032 (Utah 1989)). We will not overturn a jury verdict

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[4] The dissent also suggests that the above evidence goes only to the validity of Weis's opinion, not to the truth of her assertions. This assumption can be made if expert testimony were the only way to prove the truth of the statements. However, neither the dissent nor Jenkins has pointed to any cases which require only the use of expert testimony to prove truth. Further, as stated above, along with the lay testimony presented, Jenkins's own expert's testimony could be used by the jury to conclude that Jenkins's thinking patterns were disordered.

unless "the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." See Nelson v. Trujillo, 657 P.2d 730, 732 (Utah 1982) (quoting McCloud v. Baum, 569 P.2d 1125, 1127 (Utah 1977)).

Directed Verdict: Emotional Distress and Invasion of Privacy

Jenkins claims the trial court improperly dismissed his causes of action for emotional distress and invasion of privacy before he was afforded a full and complete opportunity for a hearing. However, the full text of the minute entry regarding the dismissal reveals that it occurred following Weis's motion for a directed verdict, argument by counsel, and consideration by the trial court. The directed verdict motion was made at the end of the second day of trial. At that point in the trial, Jenkins had rested his case and Don Allen, Eleanor Kent, Val Edwards, and George Sutton had testified on behalf of Weis. The minute entry states:

> The jury having left the courtroom, comes now respective counsel and argue the defendant's motion for a directed verdict. Based upon the arguments of respective counsel, court orders that the motion for a directed verdict is granted in part on the issues of damages resulting from the heart attack and damages resulting from the loss of the home. Court further orders, on its own motion, that the 2nd and 3rd causes of action are dismissed.

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Jenkins has not challenged the substance of the trial court ruling. His brief on this point consists of barely more than one page and relies on a single procedural argument, i.e., the trial court did not comply with "Rule 4-501 Motions"

of the Utah Code of Judicial Administration. [5] However, this rule has to do with pre-trial and post-trial motions when there is time for research, deliberation, preparation of legal memorandum, and time for advance notice of hearing, rather than "in trial" motions made in the heat of the courtroom struggle.

A motion for directed verdict is typically made orally during trial, immediately after the court and counsel have heard plaintiff's evidence and deemed it insufficient to support plaintiff's case or some necessary element of the claim. Jenkins argues that a directed verdict must not be considered when notice and a hearing are lacking. But, Jenkins had the usual notice for the motion and hearing. He does not contend that he objected to the motion, objected to the ruling, asked that the motion proceedings be placed on the record, or

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[5] Rule 4-501 of the Code of Judicial Administration provides the appropriate method for submitting motions to the court. Rule 4-501(1)(a) states that "[a]ll motions ... shall be accompanied by a memorandum of points and authorities ... appropriate affidavits, and copies of or citations by page number to relevant portions of depositions. Memoranda ... shall not exceed ten pages." Subsection (b) goes on to state that "[t]he responding party shall then file and serve upon all parties within ten days ... a memorandum in opposition to the motion, and all supporting documentation." Subsection (c) then provides that "[t]he moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum." Subsection (d) states that either party may submit the matter to the court for decision upon the expiration of the five-day period to file the reply memorandum.

requested additional time to respond. Jenkins, by his failure to take any affirmative actions at trial, has not preserved the issue for appeal. See In re Estate of Justheim, 824 P.2d 432, 434-35 (Utah App.1991); LeBaron & Assocs., Inc. v. Rebel Enters., Inc., 823 P.2d 479, 482-83 (Utah App.1991).

Moreover, he has not supplied us with a trial transcript or a transcript of the motion proceedings which took place at the end of the second day. Thus, he has prevented us from reviewing either the procedural or substantive aspects of the action taken by either court or counsel. [6]

Even if he had preserved this issue for appeal, we cannot review the absent trial court record to determine whether his claims are meritorious.

Jury Instructions

Jenkins alleges that the trial court's jury instructions "at best, must have been confusing to the jury." Weis asserts that because Jenkins failed to properly object to the jury instructions below, he is precluded from raising an objection to the instructions on appeal. We agree. Failure to properly object to a jury instruction below bars an appellant from raising the issue on appeal. Hansen v. Stewart, 761 P.2d 14, 16 (Utah 1988); In re Estate of Justheim, 824 P.2d 432, 438 (Utah App.1991). Jenkins has failed to show anywhere in the record where he

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[6] The dissent argues that only the damage issue relating to Jenkins's heart attack and loss of his home were discussed at the motion proceedings at the end of the second day of trial. However, this seems impossible to determine without a transcript of the motion proceedings.

made any objection to the jury instructions. Accordingly, we will not consider this issue on appeal.

Involvement of Attorney General's Staff

Jenkins asserts that because he sued Weis in her individual capacity, the trial court improperly allowed counsel from the state attorney general's office to represent Weis. Jenkins also alleges the trial court improperly allowed members of the attorney general's staff to testify at trial.

Jenkins did not adequately raise this issue before the trial court. Jenkins refers to a letter sent by his counsel to the attorney general's office challenging its representation of Weis. Jenkins submitted this letter and the response from the attorney general's office

as part of his response to a motion for summary judgment. However, Jenkins never submitted any request or motion to the court to disqualify the attorney general's office from representing Weis or to prevent members of the attorney general's staff from testifying. Further, the record does not reveal any objection by Jenkins when attorney general staff members appeared as witnesses in court. We will not decide an issue unless the trial court has first had the opportunity to address the issue. Smith v. Iversen, 848 P.2d 677, 677 (Utah 1993); Jolivet v. Cook, 784 P.2d 1148, 1151 (Utah 1989). Accordingly, because Jenkins failed to properly present these issues to the trial court for resolution, we will not consider them on appeal.

Pretrial Motions

Jenkins asserts that the trial court abused its discretion in ruling on untimely pretrial motions. Specifically, Jenkins challenges the trial judge's ruling, four days before trial,

that Jenkins was a public figure. Again, Jenkins failed to preserve this issue for appeal. He has not identified any part of the record showing that he made any objection to the ruling, which he now claims was untimely. Further, Jenkins could have filed a motion for continuance of the trial if, as he now asserts, it was "humanly impossible for his attorney to prepare" for trial in the days remaining because of the public figure ruling.

CONCLUSION

Because the jury found Weis's statements to be true, the trial court's ruling that Jenkins was a public figure, if improper, was harmless. The trial court also properly dismissed Jenkins's other causes of action. Further, we do not address the following issues because Jenkins did not properly preserve them for appeal: whether the trial court submitted an erroneous jury instruction, whether the trial court improperly allowed counsel from the state attorney general's office to represent Weis and improperly allowed members of the attorney general's staff to testify at trial, and whether the trial court improperly decided a pretrial motion within five days of trial.

GARFF, J., concurs.

BENCH, Judge (dissenting):

I respectfully dissent. I would reverse the trial court's denial of Jenkins's motion for a new trial on the defamation claim because the evidence does not establish the truthfulness of the defamatory statements. I would also reverse the trial court's dismissal of the claims of intentional infliction of emotional distress and invasion of privacy because Jenkins had no notice and opportunity to be heard on the court's sua sponte action. In view of these crucial errors, I would reverse and remand the

case for further proceedings.

Truth of Defamatory Statements

Jenkins challenged the jury's verdict in his motion for a new trial, claiming that there was insufficient evidence to support the jury's conclusion that the defamatory statements made by Weis were in fact true. The trial court denied his motion.

Where the trial court has denied the motion for new trial, its decision will be sustained on appeal if there was "an evidentiary basis for the jury's decision...." The trial court's denial of a motion for a new trial will be reversed only if "the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." Nelson v. Trujillo, 657 P.2d 730, 732 (Utah 1982) (quoting McCloud v. Baum, 569 P.2d 1125, 1127 (Utah 1977)); see also Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985) ("we will not substitute our judgment for that of the jury where a verdict is supported by substantial and competent evidence").

Typically, an appellant challenging the sufficiency of the evidence must first marshal the evidence in support of the jury verdict and then show how the evidence is insufficient. Crookston v. Fire Ins. Exch., 817 P.2d

789, 799 (Utah 1991). In this case, however, Jenkins asserts that there is no evidence that establishes the truthfulness of the defamatory statements. [1] Since there is purportedly

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[1] Contrary to the majority's suggestion as to how this case was argued in his brief on appeal, Jenkins directly challenged the sufficiency of the evidence. In challenging the court's decision to submit Weis's affirmative

nothing to marshal, the marshaling requirement is satisfied without rehearsing the evidence. Inasmuch as Weis does not assert that there is evidence to establish that Jenkins was in fact a "paranoid schizophrenic," "mentally deranged," or "a vicious, vicious person," we should accept Jenkins's assertion that there is no such evidence.

Weis acknowledges that she did not present at trial any expert testimony or any other evidence that Jenkins was in fact a paranoid schizophrenic, mentally deranged, or a vicious person. She argues, however, that Jenkins misconstrues her defense, which is that she did not use those terms in a clinical sense. She contends that she used the terms only as "street expressions," much like saying a person is "nuts" or "crazy." In other words, she claims she did not really mean that Jenkins actually met the "psychiatric diagnostic criteria of a 'paranoid schizophrenic.' " Although claiming truth as a defense, Weis asserts that she had no burden to prove that Jenkins was in fact a paranoid schizophrenic, mentally deranged, or a vicious person. Weis's argument fails as a matter of law.

While Weis's subjective intent may have some relevancy to whether she acted with malice, it has no relevancy to the question of whether her statements were in fact true. [2] It is not the

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defense to the jury, Jenkins urged that "there was no expert testimony provided by the appellee" to establish that the defamatory statements were true.

[2] The fact that Weis couched her statements in opinion language does not allow her to escape liability for her comments by merely showing that she in fact believed what

truth of her privately-intended, subjective message that is at issue--it is the message that damages the plaintiff's public reputation that must be true.

"Libel" means a malicious

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she said she believed. Opinions regarding facts are not unconditionally privileged. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 17-20, 110 S.Ct. 2695, 2705-06, 111 L.Ed.2d 1 (1990). The Supreme Court expressly acknowledged in Milkovich that the statement, "[i]n my opinion John Jones is a liar" implies "a knowledge of facts which lead to the conclusion that Jones told an untruth." Id. This statement is therefore just as damaging as a direct assertion that "Jones is a liar." The Supreme Court explained that if the substance of a statement couched in opinion language is capable of being proven true or false, it is subject to suit. Id.; see also West v. Thomson Newspapers, 835 P.2d 179, 183-87 (Utah App.) (interpreting Milkovich), cert. granted, 843 P.2d 1042 (Utah 1992).

Weis's statements imply knowledge of conduct that leads to a conclusion that Jenkins is in fact a paranoid schizophrenic, mentally deranged, and a vicious person. These assertions are capable of being proven true or false and are therefore subject to suit for defamation. The evidence summarized by the majority goes not to the truth of Weis's statements, but only to the validity of her opinion. In order to assert truth as a defense, Weis must prove that Jenkins was in fact a paranoid schizophrenic, mentally deranged, and a vicious person, not merely that she believed him to be so. Her subjective beliefs go only to the question of malice. See Milkovich, 497 U.S. at 20 n. 7, 110 S.Ct. at 2706 n. 7.

> defamation, expressed either by printing or by signs or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt or ridicule.

Utah Code Ann. Sec. 45-2-2(1) (1993).

To say that a person is mentally deranged, and then to provide a specific clinical diagnosis such as paranoid schizophrenia, and to accuse the person of being so vicious that the speaker fears for her family's safety, cannot be dismissed as mere "street expressions" simply because Weis subjectively intended that they be so interpreted. [3] Such statements do not

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[3] Calling an individual "clinically paranoid" is a diagnosis that requires expert testimony to verify the condition. See, e.g., Alpar v. Weyerhaeuser Co., 20 N.C.App. 340, 201 S.E.2d 503, 507 (defendant's pleading alleging both non-utterance and defense of truth for libelous interoffice letter, which accused plaintiff of being "clinically paranoid," prompted plaintiff to have expert witness to rebut defendant's clinical diagnosis), cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974). Similarly, as in the instant case, calling an individual a "paranoid schizophrenic" is a clinical diagnosis that requires expert testimony to verify the condition. Cf. Webster's Medical Desk Dictionary 640 (1986) (defining "schizophrenia" as a "psychotic disorder," or psychosis); id. at 588 (defining psychosis as a "serious mental illness (as schizophrenia)"). To say that a person has a "serious mental illness" is not merely street language, but clearly requires an expert witness to verify the truthfulness of the diagnosis. Cf. Brehany v. Nordstrom, Inc., 812 P.2d 49, 57

convey any objective message
- Page 868 P.2d 1382 -
other than the plain meaning of the words used. They are not "rhetorical hyperbole." See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41 (1988) (rhetorical hyperbole is protected because it cannot "reasonably [be] interpreted as stating actual facts" about an individual); accord Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 13-14, 90 S.Ct. 1537, 1541-42, 26 L.Ed.2d 6 (1970). A reasonable person, taking Weis's statements, as a whole, would objectively assume that she was saying that Jenkins was in fact a paranoid schizophrenic, mentally deranged, and a vicious person. The jury itself held that the statements were defamatory, a conclusion it would not likely draw from simple "street expressions."

Because of Weis's strategic failure to present any expert evidence to prove that Jenkins was in fact a paranoid schizophrenic, mentally deranged, or a vicious person, the special jury verdict completely lacks supporting evidence. [4] The trial court erred as a matter

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(Utah 1991) (defense of truth can only be established if defamatory charge is "true in substance"). Therefore, since terms such as "paranoid schizophrenic" are specific clinical diagnoses, the only way they can be "true in substance" is if an expert witness verifies such diagnoses.

[4] The majority points to Jenkins's own expert, Dr. Mohr, to establish that Jenkins had a disordered thinking pattern. Unlike the majority, I do not believe that Dr. Mohr's testimony that "people with disordered thinking patterns have a tendency to see conspiracies against them" in any way infers that Jenkins had

of law in not vacating the special verdict and granting a new trial. Because I would remand for a new trial, I would also hold that the trial court erred in ruling that Jenkins was a public figure in view of Weis's failure to establish the bases for the privilege. Specifically, Weis did not sufficiently identify a public controversy or show that Jenkins had voluntarily and successfully placed himself at the forefront of the controversy in an attempt to order society. See generally Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C.Cir.), cert. denied, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980).

Sua Sponte Dismissal

Jenkins asserts that the trial court abused its discretion by dismissing, on its own motion, his causes of action for intentional infliction of emotional distress and invasion of privacy. The trial court did not explain under what authority or for what reason it dismissed Jenkins's causes of action. We do know, however, that the court dismissed the causes of action "on its own motion."

"Generally, a trial court may not dismiss an action when neither party has sought dismissal and there is no notice or hearing on whether there exists a justifiable cause for dismissal." Rubins v. Plummer, 813 P.2d 778, 778

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a disordered thinking pattern. The other evidence summarized by the majority does not prove that Jenkins was in fact a paranoid schizophrenic, mentally deranged, or a vicious person. While I do not concede that the evidence is even admissible, I believe it can only go to the validity of Weis's opinion. See note 2.

(Colo.App.1990). Unless expressly granted authority to act on its own motion, a trial court must typically limit its rulings to the motions placed before it. "[A] trial court has no authority to render a decision on issues not presented for determination. Any findings rendered outside the issues [presented] are a nullity." Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733, 736 (Utah 1984); see also Utah R.Civ.P. 7(b)(1) ("application to the court for an order shall be by motion"). Because Weis did not make a motion for a directed verdict, the trial court plainly erred when it dismissed Jenkins's

causes of action without first giving Jenkins notice and an opportunity to argue against dismissal. Cf. Preuss v. Wilkerson, 858 P.2d 1362, 1362-63 (Utah 1993) (trial court must give notice and opportunity to be heard before dismissing claim for failure to prosecute).

Weis nevertheless asserts that any "procedural error" committed by the trial court was harmless because insofar as the merits of the trial court's ruling are concerned, directed verdicts were appropriate. Regardless of whether a directed verdict might have been granted had the motion been properly made, noticed, and heard, the trial court's ruling was void at its inception. A judgment is void "if the court that rendered it ... acted in a manner inconsistent with due process." Richins v. Delbert Chipman & Sons Co., 817 P.2d 382, 385 (Utah App.1991) (quoting Automatic Feeder Co. v. Tobey, 221 Kan. 17, 558 P.2d 101, 104 (1976)); accord In Re Estate of Jones, 858 P.2d 983, 985 (Utah 1993); Brimhall v. Mecham, 27 Utah 2d 222, 224, 494 P.2d 525, 526 (1972); Workman v. Nagle Constr., Inc., 802 P.2d 749, 753 (Utah App.1990).

In our judicial system, except in extraordinary circumstances that are not

> present here, all parties are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision. The failure to give adequate notice and opportunity to participate can constitute a denial of due process under article I, section 7 of the Utah Constitution.

Plumb v. State, 809 P.2d 734, 743 (Utah 1990) (citations omitted).

Sua sponte decisions by trial courts are inconsistent with the notion of due process when parties are not provided advance notice that the court is considering a given course of action, and the losing party is not allowed to be heard thereon. [5] "The right to prior notice and an opportunity to be heard is a critical part of our judicial system.... A method of resolving cases that bypasses this requirement can not be

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[5] From all that appears in the record, Jenkins had no notice and hearing on the court's sua sponte dismissal of his causes of action for intentional infliction of emotional distress and invasion of privacy. Jenkins claims that the dismissal was "without findings and on the Judge's own motion in his chambers without a court reporter present." In any event, the minute entry itself indicates:

> Based upon the arguments of respective counsel, court orders that the motion for a directed verdict is granted in part on the issues of damages resulting from the heart attack and damages resulting from the loss of the home. Court further orders, on its own motion, that the 2nd and 3rd causes of action are dismissed.

(Emphasis added.)

accepted as a fair, neutral, and rational process." Rubins, 813 P.2d at 780 (citing Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)); see also Nelson v. Jacobsen, 669 P.2d 1207, 1211 (Utah 1983) ("Timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness.").

> A trial court should normally refrain from dismissing a complaint for failure to state a claim unless such a deficiency is brought to its attention by way of pleadings or motions by the parties. If the court is inclined to dismiss sua sponte, it must afford the plaintiff an opportunity to be heard.... While we agree that circumstances might arise when a trial court is justified in raising the dismissal sua sponte, it should, as a matter of fundamental fairness, if not procedural due process, give plaintiff an opportunity to persuade the court that dismissal is not proper.

Rubins, 813 P.2d at 779 (citations omitted).

The lack of notice and opportunity to be heard are further aggravated by the fact that a trial court acting sua sponte has abandoned its impartial position and has become an advocate for one party over the other. See Ricketts v. Midwest Nat. Bank, 874 F.2d 1177, 1184 (7th Cir.1989). "Preservation of the integrity of the adversarial system of conducting trials precludes the court from infringing upon counsel's role of advocacy.... [T]he interests of justice are not

enhanced when the court exceeds its role as arbiter by reaching out and deciding an issue that would otherwise be dead...." Girard v. Appleby, 660 P.2d 245, 247 (Utah 1983).

Since the sua sponte dismissal of Jenkins's

causes of action was void, it cannot be affirmed, regardless of whether a directed verdict would have been permissible had the motion been properly made. Cf. Birch Creek Irrigation v. Prothero, 858 P.2d 990, 993 (Utah 1993) (trial court erred in granting permanent injunction on motion for preliminary injunction, regardless of whether permanent injunction would have been appropriate upon proper motion). A void judgment cannot subsequently become a valid judgment. "Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly." Garcia v. Garcia, 712 P.2d 288, 291 (Utah 1986) (quoting 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure Sec. 2862 (1973)). I would therefore vacate the trial court's sua sponte dismissal of Jenkins's second and third causes of action.

APPENDIX "B"

248 Utah Adv. Rep.26

IN THE SUPREME COURT
OF THE STATE OF UTAH

PETITIONS FOR WRIT OF
CERTIORARI

DENIED:
(Case Name; Supreme Court Number; Date Filed; Citation of Court of Appeals Opinion)
Jenkins v. Weis, 940130, Sept. 8, 1994, 230 Utah Adv. Rep. 25.

APPENDIX C.

LYNN A. JENKINS I.
3 East 2750 South
Bountiful, Utah 84010
Telephone: (801) 299-1520
Plaintiff/Petitioner,pro se.

IN THE SUPREME COURT FOR
THE STATE OF UTAH

LYNN A. JENKINS I.,	)	
	)	NOTICE OF
	)	PETITION FOR
Plaintiff/Petitioner,	)	WRIT OF
	)	CERTIORARI
vs.	)	TO THE
	)	UNITED STATES
ELAINE B. WEIS,	)	SUPREME COURT
	)	
Defendant/Respondent.	)	Case No. 940130

NOTICE is hereby given that plaintiff and petitioner, Lynn A. Jenkins, I., pro se, appeals to the United States Supreme Court the final order of this Honorable Court entered in this matter on the 6th day of September, 1994. The Petition for Writ of Certiorari is taken from the entire judgment of the Utah state courts.

DATED this 5th day of December, 1994.

/S/
Lynn A. Jenkins I.,
Plaintiff/Petitioner, pro se

CERTIFICATE OF DELIVERY

I hereby certify that on the 6th day of December, 1994 a true and correct copy of the foregoing Notice of Petition For Writ of Certiorari was hand delivered to:

Jan Graham, Esq.
Attorney General
Elizabeth King, Esq.
Assistant Attorney General
330 South 300 East
Salt Lake City, UT 84111

/S/
Lynn A. Jenkins, I.